IN THE

Supreme Court of the United States

October Term, 1938

No. 582

ELECTRICAL FITTINGS CORPORATION, JOSELSON SALES CORPORATION, SAMUEL JOSELSON and BELLE JOSELSON,

Petitioners,

vs.

THE THOMAS & BETTS CO. and NATIONAL ELECTRIC PRODUCTS CORPORATION,

Respondents.

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF FOR PETITIONERS.

1. Respondents' "Supplemental Statement of the Case" ds nothing to the statement in petitioners' brief except umentative assertions relative to the merits of the patent suit, with which this Court is not concerned in answering single question here presented. In consequence, peti-ners will not here discuss that subject, even though it is ieved that neither these nor any other arguments can e the obviously invalid patent here involved.

2. On the merits of the issue that is presented respon-ts repeatedly (*e. g.* pp. 14, 19, 21, 22) misstate the fact which the case is here before the Court. This misstate-nt is that petitioners are seeking to obtain a review of "a nding" of the District Court. That is not the case. To

the contrary, petitioners are asserting their right to a review of a *final decree*.

3. On page 18 respondents assert that the Court of Appeals below "did not have *jurisdiction* to review this case" and submit that for that reason "the writ of certiorari should be dismissed". Respondents advance no authority showing or implying want of *jurisdiction* of the Court of Appeals below. As petitioners pointed out in their main brief (p. 7), the statute provides that a Circuit Court of Appeals shall have appellate *jurisdiction* to review *final decisions* of its District Courts. In view thereof we know of no reason why the Court of Appeals in the present case did not have *jurisdiction*, and respondents' brief advances none other than the contention that the decree of the District Court terminated the case in petitioners' favor by denying respondents' prayer for an injunction and accounting. It is self evident that this alleged reason has no bearing on the subject of *jurisdiction*.

Moreover, the reasoning advanced in support of respondents' assertion is fallacious in the extreme. It is asserted (p. 18) that because

> "petitioners (defendants below) admittedly claim no title to the patents in suit and no right to an injunction based thereon"

the Court below was without *equitable* jurisdiction to hear and determine the question here presented

> "because all equitable jurisdiction had been ousted".

The fallacy of this reasoning will be self evident when it is remembered that no defendant in an ordinary patent infringement suit claims title to the patent on which he is sued, and has no right to an injunction based on the patent. If these factors are necessary to a right of appeal, as

respondents apparently seem to believe, no defendant in an ordinary patent infringement suit would ever have the right to appeal from an adverse decision where an injunction is denied but the patent held valid and infringed.

Of course, respondents are confused about the matter as the authority cited in support of their statement makes perfectly clear (*Peters Patent Corp. v. Bates and Klinke*, 295 U. S. 392, 394). In that case this Court quite properly held that a patent infringement suit in equity could not be maintained unless the plaintiff was possessed of the title to the patent and the right to seek an injunction to restrain infringement thereof. Obviously, title to the patent was necessary to maintain the action, and the plea for injunctive relief gave jurisdiction in equity. Apparently it is respondents' contention that because an injunction was denied in the present case the cause is no longer in *equity* and, in consequence, the Court of Appeals below is ousted of *equitable* jurisdiction. We regard such contention as without merit, for it is the *decree* entered by the District Court, after having assumed equitable jurisdiction at respondents' solicitation, that is sought to be reviewed.

4. Nor does petitioners' question here presented raise only "*a moot or academic question*" as respondents urge (p. 19). As pointed out in petitioners' main brief (p. 8), the validity or legal basis for *any* monopoly, created by statute or otherwise, is never a moot or academic matter because it affects the public interest as well as petitioners' private interest. If the present final decree of validity of the patent is allowed to stand without review it forever binds petitioners under the doctrine of *res judicata*, as petitioners' brief has pointed out and respondents nowhere deny. It is not a case of "assumed potential invasions" as implied by respondents (p. 19). Quite to the contrary, it

is an *actual, outstanding decree* constituting the *final and absolute law* on the subject as between petitioners and respondents.

Thus, though respondents conclude their brief by asserting (p. 32) that

> "petitioners will have an opportunity to raise, at the proper time and place, any matter of a justiciable character"

and cite in support thereof the language of the Court of Appeals below to the effect that petitioners

> "may still raise the issue (of validity) if and when suit is brought against them for infringement or against any customer whom they may feel obligated to defend" (Matter in parenthesis ours)

respondents nowhere deny or cite authority to negative the fact that the doctrine of *res judicata* would be completely applicable in the present case, and would forever preclude petitioners from attacking the validity of the patent by reason of the unreviewed *final decree* in the present case. The quoted remark of the Court of Appeals has no binding legal effect even on respondents, much less on other courts before whom future litigation would come. It is self evident, therefore, that the authorities cited by respondents (pp. 20, 21) are not in point. So far as the issue of validity of the patent is concerned, this is a continuing "controversy" which is "actual" and involves "real" as well as "substantial rights of the parties", and which has not been "extinguished" by the final decree of the case.

3. Finally, this Court in *Corning et al.* v. *The Troy and Nail Factory*, 15 How. 449, cited and discussed by respondents (pp. 22, 25), did not have before it and did not pass on the question here presented. Quite to the contrary, the

final decree in that case (reproduced in full in *Troy Iron and Nail Factory* v. *Corning*, 14 How. 194) was

> "Therefore it is ordered, adjudged and decreed that the said bill of compiaint be, and the same is hereby dismissed, with costs to be taxed, and the defendants have execution therefor."

The recitation of validity of the patent preceded the decree in the same document. As distinguished therefrom, in the case at bar the validity of the patent is decreed—*it forms the decree itself.* This distinction was recognized by this Court in the second consideration of the *Corning* case in 15 How. 465, and it was expressly pointed out:

> "*But the matter complained of* (the holding of validity) *forms no part of the decree of the Court below.*" (Matter in parenthesis ours.)

It is obvious, therefore, that the *Corning* case is neither controlling nor applicable to the one at bar.

Conclusion.

The question presented should be answered in the affirmative and the judgment of the Second Circuit Court of Appeals reversed, and the cause remanded to that Court with instructions to reinstate petitioners' appeal and to pass on the merits thereof.

Respectfully submitted.

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